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IN THE

Supreme Court of the United States

October Term, 1954.

No. 163.

CHARLES LAWLOR and MITCHELL PANTZER, Co-Partners Trading as INDEPENDENT POSTER EXCHANGE,
Petitioners,

v.

NATIONAL SCREEN SERVICE CORPORATION, et *al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the district court (R. 76a) is not reported officially but is reported in CCH Trade Cases [1952-1953] ¶ 67,619. The opinion of the court of appeals (R. 89a) is reported at 211 F. 2d 934.

STATUTES INVOLVED.

The claim asserted by plaintiffs in the prior suit and here is a claim purporting to arise under the antitrust laws, but the questions presented do not involve the interpretation or application of those laws.

QUESTIONS PRESENTED.

1. Where plaintiffs earlier sued for damages and injunctive relief under the antitrust laws and then settled their claim and caused it to be dismissed with prejudice by the court, is their second action, asserting the same basic claim, barred as res judicata?

2. Where the prior antitrust suit attacked certain exclusive contracts between the defendants concerning the manufacture and distribution of copyrighted advertising poster materials, and the settlement of the suit was based on a license contract under which plaintiffs thereafter acquired the materials and covenanted not to challenge the arrangements in question, are plaintiffs estopped to sue again by their conduct in (a) entering into the license, under which they acquired not only the materials then being produced and distributed under exclusive contracts but also those as to which additional exclusive contracts might be made in the future, (b) voluntarily renewing the license at its expiration and (c) accepting down to the present time the benefits of the license and of the business arrangements complained of?

STATEMENT OF THE CASE.

Both courts below held this action barred as res judicata on the following facts:[1]

In April 1942, the present plaintiffs and other poster renters brought an antitrust suit in the District Court for the Eastern District of Pennsylvania against National Screen Service Corporation and three motion picture producers (respondents or affiliates of respondents here). The suit was on the same claim pleaded in the present action and for relief similar to the relief requested here.

The complaint in the prior suit[2] charged that National Screen had contracted with each of the three producer defendants for the exclusive right to distribute posters advertising the respective producers' motion pictures (SA 8-9, 14), that the contracts were, and were intended by National Screen to be, steps toward the establishment of a monopoly by National Screen (SA 9, 10, 13-14) and, further, that at the time the complaint was filed National Screen was negotiating similar exclusive contracts with four other producers (respondents, or affiliates of respondents here) (SA 9-10). The complaint in the prior action, as in the instant case, sought treble damages and injunctive relief which would have required the termination of the then-existing exclusive contracts between National Screen and the producers, would have prohibited entry by National Screen into exclusive contracts with any other producer, including those with whom the complaint alleged National Screen was then negotiating, and would have required the producer defendants to maintain supplies of advertising posters and make them available to plaintiffs.

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1. The petition for certiorari states certain facts inaccurately, others in such a way as to create wholly erroneous impressions, but there is no point in discussion of such matters here since they do not bear on the questions presented.

2. The complaint is set forth in petitioners' "Supplemental Appendix to Petition for Certiorari", hereinafter cited "SA".

One year after the suit had been started, it was settled and dismissed with prejudice (R. 84a). The settlement was based on an agreement under which the plaintiffs entered into a "sublicense" contract with National Screen (R. 18a). The contract (R. 23a *et seq.*) provided that National Screen would furnish plaintiffs the posters National Screen was then under exclusive contracts with the producers to prepare and distribute and also those for which National Screen might in the future contract with other producers.

More than six years later, plaintiffs commenced the present action. The present amended complaint (R. 6a *et seq.*) makes the same charge of conspiracy and the same claim of illegal monopoly by virtue of the exclusive contracts between National Screen and the producers, and again seeks treble damages and injunctive relief.

The Court of Appeals for the Third Circuit (Judges Goodrich, McLaughlin and Hastie), unanimously affirming Chief Judge Kirkpatrick of the District Court, held that plaintiffs' present suit is based on "essentially the same course of wrongful conduct of which they complained" in the prior action and that the present suit is therefore barred (R. 93).

ARGUMENT.

The primary ground advanced to justify certiorari is a supposed conflict with **United States v. International Building Co.**, 345 U. S. 502 (1953), a tax case which held that there can be no **collateral estoppel** effect from a consent judgment, although such a judgment is clearly **res judicata** and a bar to reassertion of the same claim or cause of action (see the portion of the opinion quoted in the petition, p. 7). As both courts below recognized (R. 78a, 90a), the instant case does not involve any question of collateral estoppel. The decision that plaintiffs are barred in this action rests, not on collateral estoppel, but on the fact that the claim asserted here is the same claim that was dismissed with prejudice in the prior action.

Both courts concluded that the two actions were based on the same claim. Plaintiffs advance no argument here to refute that conclusion except to label it "manifestly untenable" and cite four cases which have no bearing at all on the question of the identity of the instant claim with the claim in the prior action (petition, p. 8 and n. 10); none of those cases involved a prior claim for **injunctive** relief against a continuing course of conduct (dismissed with prejudice) and a later suit on the same claim. In such a situation, a dismissal of the prior claim for injunctive relief bars reassertion of the claim.[3]

The crux of the case then is the factual identity of the present claim with the prior one. Plaintiffs have never disputed the identity of the underlying facts, and in any event we submit that this Court certainly should not exercise its discretionary certiorari jurisdiction to review the

3. The petition at several points suggests the argument which plaintiffs relied on below, namely, that the claim in the instant case is really a different one because damages are claimed for a later period. This argument, of course, ignores the fact that what was dismissed with prejudice in the prior case was not a mere damage claim but a claim for injunctive relief.

unanimous conclusion of two lower federal courts which have found the requisite factual identity.

Nor does this case involve the "devastating effect" on the antitrust laws suggested by petitioners. Stripped of its incendiary charges, their argument boils down to the startling proposition that private antitrust claims should be given special immunity from res judicata and other applicable principles of law.

Antitrust claims, like any others, have always been subject to such traditional defenses as res judicata, release, etc. *E.g.*, **Partmar Corp. v. Paramount Pictures Theatres Corp.**, 347 U. S. 89 (1954); **Duffy Theatres, Inc. v. Griffith Consolidated Theatres, Inc.**, 208 F. 2d 316 (10th Cir. 1953), *cert. denied*, 347 U. S. 935 (1954).

This is nothing more than a case of an asserted private right defeated by the affirmative defense of res judicata. There is no effect on the rights of any other private party whose case is not subject to such an affirmative defense,[4] and there is no effect on the rights of the Government.

The doctrine of res judicata has been fairly and justly applied on the facts of this case. If there were merit to plaintiffs' antitrust claim, they could have obtained from the court in the prior action an injunction to stop, thereafter, any violation of law found to exist. They would have restrained continuance of the very conditions they now allege have continued to injure them since the time they dismissed their first action with prejudice. But instead of prosecuting their first action to a conclusion plaintiffs chose to compromise their grievances by entering into the sublicense contract. It is perfectly apparent that they

4. Petitioners (p. 9) vaguely suggest a broad effect of the decision below on others similarly situated. The fact is that there were 13 plaintiffs in the prior action (SA 1). Only three of them have sued a second time, in the instant case and in two companion cases pending in the district court (Civil Action Nos. 11,136, 11,137), a fact of which we believe this Court may properly take judicial notice. There are four other companion cases (Civil Action Nos. 11,138, 11,376, 11,597, 11,678) not subject to the res judicata defense.

made this choice rather than face the hazards of litigation from which they might have emerged with nothing. If plaintiffs were permitted to avoid the res judicata consequences of their conduct under such circumstances as these, the policy that there be an end to litigation would be completely frustrated.

Petitioners' final contention, that their case is not barred as to those defendants who were not formally made parties in the prior action, is so obviously without merit that petitioners themselves did not even argue the point in the court of appeals,[5] or raise it in their petition for rehearing before the court en banc (R. 96). The holding below on this point (R. 93) adopted Chief Judge Kirkpatrick's reasoning, applying the rule of **Bruszewski v. United States**, 181 F. 2d 419 (3d Cir. 1950), that a plaintiff who has had his day in court does not get a second chance to assert the same claim against others when the relationship among all the defendants (co-conspirators under the allegations of the prior complaint as well as the present one) is close enough to require application of the doctrine of res judicata in favor of them all.

Petitioners do not mention here the second defense relied on by respondents in the courts below, namely an estoppel in pais arising out of plaintiffs' conduct in "accepting, renewing and still retaining without offering to surrender their license from National Screen" (R. 83a). Neither of the courts below found it necessary to pass on this defense in view of the complete disposition of the case on the res judicata point (see R. 83a). However, the estoppel is clear. Plaintiffs entered into the license from National Screen, expressly recognizing the validity of the existing exclusive contracts with the producers and the validity of similar contracts which might be entered into in the future (R. 26a) and expressly providing that plain-

5. Copies of petitioners' brief to the court of appeals have been lodged with the clerk of this Court.

tiffs would receive a supply of materials prepared by National Screen under any such future contracts (R. 24a). Plaintiffs have accepted all those benefits and are therefore subject to the familiar principle that one may not accept the benefits of an arrangement and then, later, attack its validity. See, *e.g.*, **McLean v. Clapp**, 141 U. S. 429 (1891); **Lyle Cashion Co. v. McKendrick**, 204 F. 2d 609 (5th Cir. 1953).

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

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